

**Good Quantum Sdn Bhd & Ors v Alliance Investment Bank
Bhd (previously known as Alliance Merchant Bank Bhd)** A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02-969-05 OF 2012 B
LINTON ALBERT, IDRUS HARUN AND PRASAD ABRAHAM JJCA
23 JANUARY 2015

*Banking — Facilities — Margin facilities — Parties entered into novation and
repayment agreements — Letters of guarantee and indemnity to jointly and
severally pay upon demand all sums due and owing — Claim against borrower
and guarantors — Liability — Claim for debts due and accruing with interest
and cost — Whether there was collateral contract and whether there was admitted
liability* C D

The respondent ('the plaintiff') was a bank and via a vesting order by the High Court, the entire business of Kuala Lumpur City Securities Sdn Bhd including all of its rights, assets and obligations were transferred to and vested in the plaintiff in their entirety. The plaintiff granted to Dunia Dimensi Sdn Bhd ('Dunia Dimensi') a margin facility with a maximum principal limit of RM6,000,000 ('the said margin facility'). This was followed by a novation agreement ('the NA') was entered into between Dunia Dimensi, the first defendant and the plaintiff whereby the first defendant assumed all of Dunia Dimensi's obligations and liabilities under the said margin agreement and also undertook to repay all sums due and owing by Dunia Dimensi to the plaintiff under the margin agreement with interest ('the redemption sum') and as consideration, Dunia Dimensi would transfer all 13,849,500 of its shares in Putera Capital Bhd ('the PCB shares') to the first defendant. A repayment agreement ('the RA') was entered into between the plaintiff and the first defendant whereby the plaintiff and the first defendant agreed, inter alia, that the first defendant would settle the redemption sum in the manner. By a letter of guarantee and indemnity ('the guarantee') the second, third and fourth defendants had, upon the consideration, agreed jointly and severally to pay to the plaintiff upon demand, all sums due and owing by the first defendant to the plaintiff under the said NA and the said RA including interest, commissions, fee and legal costs up to the maximum principal sum of RM7,500,000. The first defendant had failed to settle the sums due and owing to the plaintiff under the said NA and the said RA amounting to RM4,174,976.15. The plaintiff's claim in its action against the first defendant is for the sum of RM4,174,976.15 with continuing interest as sums due and owing. The plaintiff's claim against the second to fourth defendants is based on their liability under their respective guarantees. The plaintiff's claim against the defendants was for debts due and accruing from the margin facility between the plaintiff and Dunia Dimensi. E F G H I

- A** The plaintiff sent a letter of demand demanding for the repayment of the loan. The plaintiff claims that up till 13 February 2008, the first defendant only made part payment of RM515,635.19. Letters were sent by the defendants seeking indulgence from the plaintiff as to the delay in repaying the loan. The plaintiff sent another letter of demand to the first defendant and to the second
- B** till fourth defendants as the guarantors for the balance debt still due and accruing but the defendants failed and/or neglected to satisfy the debts. As such, the plaintiff, through this suit, claimed for debts due and accruing amounting to the sum of RM4,174,976.15 together with interest and cost. The plaintiff denied the existence of any collateral contract as alleged by the
- C** defendants and further contends that the first defendant has admitted its liability to the plaintiff under the said NA as well as the RA.

Held, allowing the appeal with costs of RM15,000:

- D** (1) The respondent had invited the appellants to enter into a proposed restructuring exercise, where the pledge of shares of PCB, to the first defendant would be redeemed by the first defendant and in return PCB would be restructured, removed from PN 17 status and by virtue of the reverse takeover the first defendant would be in control in PCB (see para
- E** 30).
- (2) It is inconceivable that the appellants would have agreed to enter into such an arrangement if not for the restructuring exercise, bearing in mind the first defendant was never the original borrower of the said loan. It was also erstwhile to note that the respondent had caused itself to be
- F** appointed as an advisor for the proposed restructuring exercise and was to earn a fee of RM600,000 (see para 31).
- (3) The restructuring exercise would require the Securities Commission's approval and that of other regulatory authorities and while this was
- G** pending, interest only was to be serviced and it is not a disputed fact the interest was serviced. The repayment agreement, the NA and the guarantee were linked to the success of the corporate restructuring and it was a condition precedent to liability under these three agreements (see paras 32–33).
- H** (4) There was credible and sufficient evidence of inducement, persuasion and assurance given by the plaintiff which constituted the collateral contract prior to the execution of the RA, the NA and the guarantee. The High Court judge based her judgment on the four corners of the existing
- I** agreements. The trial judge failed to appreciate the evidence that was before the court in respect of the collateral contract (see para 35).
- (5) The important question that the judge should have asked herself is whether if the arrangement under restructuring exercises were not in place, would the first defendant have signed the NA, the RA and the

guarantees. The evidence pointed to the fact that they signed these agreements which in effect means a taking over of Dunia Dimensi liability with the plaintiff because of the assurances given by the plaintiff to the defendants under the restructuring exercise. It would be incredulous for the defendants to agree take over these liabilities if not for assurances under the restructuring exercise. In fact, the RA is related and dependant on the successful restructuring of PCB. Since that restructuring has been rejected by the SC, the appellants could not have been liable by the judge (see para 35).

- (6) The judge also failed to take into account that the evidence pointed to the plaintiff being fully aware of this collateral arrangement and participating in them as advisor of the restructuring exercised was to earn an hefty fee (see para 36).

[Bahasa Malaysia summary]

Responden ('plaintif') adalah sebuah bank dan melalui perintah yang diberikan oleh Mahkamah Tinggi, keseluruhan perniagaan Kuala Lumpur City Securities Sdn Bhd termasuk semua hak, aset dan tanggungjawabnya telah dipindahkan dan diberikan kepada plaintif secara menyeluruh. Plaintif telah memberikan kepada Dunia Dimensi Sdn Bhd ('Dunia Dimensi') kemudahan margin dengan had prinsipal maksimum sebanyak RM6,000,000 ('kemudahan margin tersebut'). Ini diikuti dengan perjanjian novasi ('PN') yang dimasuki antara Sunia Dimensi, defendan pertama dan plaintif di mana defendan pertama telah mengandaikan semua tanggungjawab dan liabiliti Dunia Dimensi di bawah perjanjian margin itu dan juga melaksanakan bayaran semula semua jumlah yang perlu dibayar dan terhutang oleh Dunia Dimensi kepada plaintif di bawah perjanjian margin itu dengan faedah ('jumlah penebusan') dan sebagai balasan, Dunia Dimensi akan memindahkan semua 13,849,500 sahamnya ke dalam Putera Capital Bhd ('saham PCB') kepada defendan pertama. Perjanjian bayaran balik ('PBB') telah dimasuki antara plaintif dan defendan pertama di mana plaintif dan defendan pertama bersetuju, antara lain, bahawa defendan pertama akan menyelesaikan jumlah penebusan dalam cara itu. Melalui surat jaminan dan indemniti ('jaminan itu') defendan-defendan kedua, ketiga dan keempat telah, atas pertimbangan itu, bersetuju untuk bersama dan berasingan membayar kepada plaintif atas tuntutan, semua jumlah yang perlu dibayar dan terhutang oleh defendan pertama kepada plaintif di bawah PN tersebut dan PBB tersebut termasuk faedah, komisyen, fi dan kos perundangan sehingga jumlah prinsipal maksimum RM7,500,000. Defendan pertama telah gagal untuk menyelesaikan jumlah yang perlu dibayar dan tertunggak kepada plaintif di bawah PN tersebut dan PBB tersebut berjumlah RM4,174,976.15. Tuntutan plaintif dalam tindakannya terhadap defendan pertama adalah untuk jumlah RM4,174,976.15 dengan faedah berterusan sebagai jumlah yang perlu dibayar dan tertunggak. Tuntutan plaintif terhadap defendan-defendan kedua hingga

A

B

C

D

E

F

G

H

I

- A keempat adalah berdasarkan liabiliti mereka di bawah jaminan masing-masing. Tuntutan plaintif terhadap defendan-defendan adalah untuk hutang yang perlu dibayar dan terakru daripada kemudahan margin antara plaintif dan Dunia Dimensi. Plaintif telah menghantar surat tuntutan menuntut bayaran balik pinjaman itu. Plaintif mendakwa bahawa sehingga 13 Februari 2008,
- B defendan pertama hanya membuat sebahagian daripada bayaran berjumlah RM515,635.19. Surat-surat telah dihantar oleh defendan-defendan memohon kelonggaran daripada plaintif berhubung kelewatan membayar balik pinjaman. Plaintif telah menghantar satu surat tuntutan lain kepada defendan pertama dan kepada defendan-defendan kedua hingga keempat sebagai
- C penjamin-penjamin untuk baki hutang yang masih perlu dibayar dan terakru tetapi defendan-defendan telah gagal dan/atau cuai menyelesaikan hutang tersebut. Oleh itu, plaintif, melalui guaman ini, menuntut untuk hutang yang perlu dibayar dan terakru berjumlah sebanyak RM4,174,976.15 bersama faedah dan kos. Plaintif menafikan kewujudan apa-apa kontrak kolateral
- D seperti yang dikatakan oleh defendan-defendan dan selanjutnya berhujah bahawa defendan pertama telah mengakui liabilitinya terhadap plaintif di bawah PN dan PBB tersebut.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM15,000:

- E (1) Responden telah mempelawa perayu untuk memasuki penyusunan semula yang dicadangkan, di mana cagaran saham PCB, kepada defendan pertama akan ditebus oleh defendan pertama dan sebagai balasan PCB akan disusun semula, dialih daripada status PN 17 dan
- F menurut pengambilalihan terbalik defendan pertama adalah dalam kawalan PCB (lihat perenggan 30).
- G (2) Tidak dapat dibayangkan bahawa perayu-perayu bersetuju untuk memasuki aturan sedemikian jika bukan kerana pelaksanaan penyusunan semula itu, dengan mengambil kira defendan pertama bukan peminjam asal pinjaman tersebut. Perlu juga diberi perhatian bahawa responden telah menyebabkan dirinya dilantik sebagai penasihat untuk pelaksanaan penyusunan semula yang dicadangkan dan akan memperoleh fi sejumlah RM600,000 (lihat perenggan 31).
- H (3) Pelaksanaan penyusunan semula itu memerlukan kelulusan Suruhanjaya Sekuriti dan pihak berkuasa kawal selia lain dan sementara ini masih belum selesai, hanya faedah perlu dibayar dan ia bukan fakta yang dipertikaikan faedah itu telah dibayar. Perjanjian bayaran balik, PN dan jaminan itu berkait dengan kejayaan penyusunan semula korporat dan ia
- I adalah prasyarat terhadap liabiliti di bawah ketiga-tiga perjanjian tersebut (lihat perenggan 32–33).
- (4) Terdapat keterangan yang boleh dipercayai dan mencukupi tentang dorongan, pujukan dan jaminan yang diberikan oleh plaintif yang merupakan kontrak kolateral sebelum pelaksanaan PBB, PN dan

jaminan itu. Hakim Mahkamah Tinggi menjadikan perjanjian-perjanjian sedia ada tersebut sebagai asas penghakimannya. Hakim perbicaraan gagal memahami keterangan di hadapan mahkamah berkaitan kontrak kolateral itu (lihat perenggan 35).

- (5) Persoalan penting yang patut disoal sendiri oleh hakim adalah sama ada jika aturan di bawah pelaksanaan penyusunan semula itu tidak teratur, mungkinkah defendan pertama menandatangani PN, PBB dan jaminan tersebut. Keterangan menunjukkan kepada fakta bahawa mereka telah menandatangani perjanjian-perjanjian tersebut yang memberi kesan bermaksud pengambilalihan liabiliti Dunia Dimensi oleh plaintif kerana jaminan yang diberikan oleh plaintif kepada defendan-defendan di bawah pelaksanaan penyusunan semula itu. Ia agak meragukan untuk defendan-defendan bersetuju mengambil alih liabiliti tersebut jika bukan kerana jaminan di bawah pelaksanaan penyusunan semula itu. Bahkan, PBB itu adalah berkaitan dan berasingan dengan kejayaan penyusunan semula PCB. Oleh kerana penyusunan semula tersebut telah ditolak oleh Suruhannjaya Sekuriti, perayu-perayu tidak mungkin dikatakan bertanggungjawab oleh hakim tersebut (lihat perenggan 35).
- (6) Hakim juga telah gagal mengambil kira keterangan menunjukkan bahawa plaintif menyedari tentang aturan kolateral ini dan pembabitan mereka sebagai penasihat untuk penyusunan semula yang dilaksanakan adalah untuk mendapat fi yang lumayan (lihat perenggan 36).]

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
State of Brunei Darussalam v Prince Jefri Bolkiah [2007] UKPC 63, PC (refd)
Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16, FC (refd)

Appeal from: Suit No D6-22-15 of 2009 (High Court, Kuala Lumpur)

Yap Bell Pung (Haresh Mahadevan & Co) for the first, third and fifth appellants.
Jagjit Singh (Rafie bin Shafie and Joshua Vijayan Dharmaraj with him)
(Sreenevasan Young) for the second and fourth appellants.
Nad Segaram (Soo Siew Mei with him) (Shearn Delamore & Co) for the respondent.

Prasad Abraham JCA:

[1] The facts forming the back ground to this appeal before us have been elucidated quite succinctly in the grounds of Her Ladyship, the learned judge and we have precise it in our present judgment. For ease of reference we shall refer to the parties as the plaintiff and the defendants.

A BRIEF BACKGROUND

B [2] The plaintiff is a licensed bank incorporated in Malaysia and carries on the business of banking. By a vesting order dated 28 December 2006 issued by the High Court at Kuala Lumpur vide an Ex Parte Originating Summons No D4-24-429 of 2006, the entire business of Kuala Lumpur City Securities Sdn Bhd (Company No 126994-W) ('KLCS') including all of its rights, assets and obligations were transferred to and vested in the plaintiff in their entirety, effective 30 December 2005.

C [3] Pursuant to a letter of offer dated 24 March 2004 and margin trading facility agreement dated 24 March 2004 ('the said margin agreement'), the plaintiff granted to Dunia Dimensi Sdn Bhd ('Dunia Dimensi') a margin facility with a maximum principal limit of RM6,000,000 ('the said margin facility') based on the terms and conditions contained in the said margin agreement.

D [4] A novation agreement dated 23 August 2006 ('the NA') was entered into between Dunia Dimensi, the first defendant and the plaintiff whereby the first defendant assumed all of Dunia Dimensi's obligations and liabilities under the said margin agreement and also undertook to repay all sums due and owing by Dunia Dimensi to the plaintiff under the margin agreement with interest ('the redemption sum') and as consideration thereof, Dunia Dimensi would transfer all 13,849,500 of its shares in Putera Capital Bhd ('the PCB shares') to the first defendant.

E [5] A repayment agreement dated 23 August 2006 ('the RA') was entered into between the plaintiff and the first defendant whereby the plaintiff and the first defendant agreed, inter alia, that the first defendant would settle the redemption sum in the manner stated therein.

F [6] By a letter of guarantee and indemnity dated 23 August 2006 ('the guarantee') the second, third and fourth defendants had, upon the consideration contained therein, agreed jointly and severally to pay to the plaintiff upon demand, all sums due and owing by the first defendant to the plaintiff under the said NA and the said RA including interest, commissions, fee and legal costs up to the maximum principal sum of RM7,500,000 subject to the terms and conditions contained therein.

G [7] Despite numerous demands and indulgences as pleaded in the statement of claim, the first defendant had failed to settle the sums due and owing to the plaintiff under the said NA and the said RA amounting to RM4,174,976.15 as at 3 October 2008. The plaintiff's claim in its action against the first defendant is for the sum of RM4,174,976.15 as at 3 October

2008 with continuing interest as sums due and owing. The plaintiff's claim against the second to fourth defendants is based on their liability under their respective guarantees.

[8] The plaintiff's claim against the defendants was for debts due and accruing from the margin facility between the plaintiff and Dunia Dimensi. The plaintiff, through its solicitors sent a letter of demand dated 26 February 2007 demanding for the repayment of the loan. The plaintiff claims that up till 13 February 2008, the first defendant only made part payment of RM515,635.19. Letters were sent by the defendants seeking indulgence from the plaintiff as to the delay in repaying the loan:

- (a) by a letter dated 25 February 2008, the first defendant sought the indulgence of the plaintiff in the repayment of the loan, to which the plaintiff agreed (pertaining to an approval of a restructuring scheme by Securities Commission). However, the plaintiff claims that the first defendant defaulted in the repayment again and the plaintiff's solicitor sent a notice dated 5 March 2008 whereby the plaintiff informed that they will proceed to sell the PCB shares if the defendant continued to default the payment. On 17 March 2008, the plaintiff informed via letter that they had force sold some of the PCB shares for payment of the debt due and would continue doing so until the debt is satisfied;
- (b) the first defendant then requested through a letter dated 18 March 2008 to hold on to the selling of the PCB shares and made proposals for repayment and sought further indulgence on the previous proposals made, to which the plaintiff agreed. However, due to the defendant's continuous default, the plaintiff through its solicitors sent a letter of demand on 8 April 2008. Although the defendant sent letters dated 6 May 2008 and 15 May 2008 seeking indulgence, the plaintiff rejected the defendant's proposal, stating that no further indulgence would be given and the plaintiff will proceed to sell the shares and take legal action against the defendants; and
- (c) due to continuous requests from the defendant, the plaintiff decided to give final indulgence based on certain terms and conditions, to which the first defendant agreed (via letter dated 10 July 2008), with a counter proposal that was accepted by the plaintiff via letter dated 14 July 2008. As consideration, the first defendant enclosed six post-dated cheques via letter dated 17 July 2008 to the plaintiff amounting to RM810,000.

[9] The plaintiff claims that the cheques did not satisfy the debt and/or the defendants did not follow the proposal that was agreed upon. The plaintiff returned the cheques and proceeded to sell all the balance PCB shares amounting to RM2,922,542.31 to satisfy part of the debt due.

- A [10] Thereafter, the plaintiff through its solicitors sent another letter of demand to the first defendant on 23 October 2008 and to the second till fourth defendants (as the guarantors) on 4 November 2008, for the balance debt still due and accruing but the defendants failed and/or neglected to satisfy the debts. As such, the plaintiff, through this suit, claims for debts due and
- B accruing amounting to the sum of RM4,174,976.15 together with interest and cost.

- C [11] The plaintiff denies the existence of any collateral contract as alleged by the defendants and further contends that the first defendant has admitted its liability to the plaintiff under the said NA as well as the RA.

THE FIRST, SECOND AND FOURTH DEFENDANTS

- D [12] The first defendant contends that Patrick Soh Kim Ngiap ('Patrick') the Executive Director of Operations of KLCS, (now the plaintiff) in or about March 2006, approached Datuk Chang Kok Chuang (the third defendant, a director of Right Development Activities Sdn Bd ('RDA') to be the white knight earmarked by AMBB to rehabilitate PCB, under a proposed
- E restructuring exercise. It was further contended that certain representations were made by Patrick to the third defendant.

[13] The representations were as follows:

- F (a) a special purpose vehicle will take over the PCB shares that would ensure the rehabilitation of PCB from its PN17 status;
- (b) the third party was only required to service monthly interest pending the successful completion of PCB's restructuring exercise;
- G (c) the third party shall only be required to pay for the PCB. Shares upon the successful completion of PCB's restructuring exercise, and after the necessary approval from the regulatory authorities for the same are obtained, and that the guarantors shall only be liable in the event of non-payment by the first defendant. This would assist KLCS to recover
- H the non-performing loan of Dunia Dimensi;
- (d) the plaintiff shall hold the PCB shares on trust and shall re-deliver the PCB shares to the third party/special purpose vehicle after the successful completion of PCB's restructuring exercise;
- I (e) PCB will be worth more than its market capitalisation and that PCB's PN17 status will not be an issue, as AMBB was the corporate adviser; and
- (f) the third party shall play an active role in PCB's restructuring exercise.

[14] By reason of the matters set-out above, the first defendant contends that there was in existence a collateral contract to the NA, RA and the guarantee between the plaintiff and the defendants. A

[15] Beside on the existence of the above representations, the first defendant also contends that there were salient terms of the collateral contract and the terms were as follows: B

(a) that the first defendant shall take over the obligations of Dunia Dimensi's defaulting loan in consideration for the transfer of the PCB shares in favour of the first defendant, with a view to facilitate the rehabilitation of, and PCB's restructuring exercise; C

(b) the price to be transacted for PCB shares was set by KLCS at RM0.551 per share, when the closing price for the PCB shares at the, material time was RM0.36 per share; and D

(c) that the first defendant shall only service monthly interest pending the successful completion of PCB's restructuring exercise and that the guarantors shall only be liable in the event of non-payment by the first defendant. E

[16] Acting upon and in reliance upon the purported representations by KLCS/the plaintiff and based on the collateral contract, the defendants contend that they were induced to enter and execute the NA, RA as well as the guarantee. It is also the first defendant's contention that the plaintiff has acted in breach of the collateral contract by reason of, inter alia: F

(a) the insistence of payment for the PCB shares before the successful completion of PCB's restructuring exercise; and

(b) the unlawful sale of 14,000 of the PCB shares on 17 March 2008 and the continued sale of PCB shares before successful completion of PCB's restructuring exercise. G

[17] Alternatively, it is contended, that by the NA and RA, it was a condition precedent to any liability on the part the first defendant that approval is obtained from Bursa Saham Malaysia Bhd for the transfer of the PCB shares to the first defendant. However, the said condition was not performed since the Bursa's approval was not obtained. By that token it follows, the plaintiff cannot now seek to enforce the aforesaid agreements. H

[18] As a consequence of the improper sale of the PCB shares by the plaintiff, the first defendant has suffered loss and damage and claims for damages for conversion. I

- A [19] As a consequence of the improper sale of the PCB shares by the plaintiff, the first defendant has suffered loss and damage and claims for damages for conversion.
- B [20] In its counter claim, the first defendant claims that the plaintiff had negligently, recklessly and/or were guilty of mala fide when it failed to make the most of the security in the PCB shares to the best of advantage and/or to the material prejudice of the first defendant. It is contended by the first defendant that as at 17 March 2008, the PCB shares were worth RM3,739,365 (the security value), and that the plaintiff could have realised the said sum in settlement of the alleged outstanding amount. As a result of the plaintiff's negligence, the first defendant has been deprived its rights to redeem the PCB shares, and accordingly now are claiming for loss and damages.
- C
- D [21] Dunia Dimensi was granted the said margin facility which it used to acquire 13,849,500 shares of PCB (PCB shares). In about the year 2005, Dunia Dimensi was unable to repay the margin facility with interest accrued thereon and had been deemed non-performing.
- E [22] The plaintiff entered into discussions with the fifth defendant to act as the phrase is commonly known in commercial parlance 'the white knight' in a corporate restructure of PCB. The initial plan was for the loan of Dunia Dimensi loan to be repaid and PCB rehabilitated and a reverse takeover of PCB by the fifth appellant. To this end, several meetings were held between the third defendant, PW2 and PW3 (see evidence of PW3 at pp 449–450 *rekod rayuan Jld 2(2) Bahagian B*).
- F
- G [23] The third defendant was advised by the plaintiff for the takeover of PCB to inject construction projects worth RM300 million into PCB. In the spirit of this proposed corporate restructure exercise, on the 7 June 2005, the plaintiff wrote a mandate letter to PCB to offer advice on the corporate exercise and to act as advisor for a fee. It stands to reason to act a 'white knight' this letter would not have been issued if not for the existence of these collateral terms (mandate letter found in pp 932–942 *rekod rayuan Bahagian C*, see also Q & A 4 and Q & A 5 at pp 431–432 *rekod rayuan Jld 2 Bahagian B*).
- H
- I [24] The aforesaid evidence in relation to the collateral contract as pleaded by the appellants were before the learned judge but the learned judge chose to confine herself to the four corners of the novation agreement, the repayment agreement and the guarantees and since these documents made no reference to the collateral contract, the learned judge rejected the argument of a collateral contract.

[25] We are well aware that an appellate court would be loath to interfere with the findings of facts made by the learned judge at a trial save and except in exceptional circumstances, however we find that the learned judge had failed to properly evaluate the body of evidence before the court to establish the existence of a collateral contract as pleaded by the appellants.

A

B

[26] We therefore find that this case decries appellate intervention despite the High Court findings of fact, and reference is made to the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* reported in [2005] 2 MLJ 1; [2004] 4 CLJ 309 where it was held:

C

[1] The Court of Appeal had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of the evaluation of the evidence by the trial court. Clearly, the phrase '*insufficient judicial appreciation of evidence*' merely related to such a process. This was reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. *The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This was consistent with the established 'plainly wrong' test.* Therefore, there was no merit in the appellants' contention that the Court of Appeal had adopted a new test for appellate intervention. What the Court of Appeal had done was merely to accentuate the established 'plainly wrong' test consistently applied by the appellate courts in this country (pp 320f-h and 321a). (Emphasis added.)

D

E

F

[27] Turning to the issue of the existence of a collateral contract being in existence as pleaded by the appellants, the law on the same has developed over period of a time and the Federal Court decision in the case *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 is referred wherein the Federal Court held:

G

An oral promise, given at the time of contracting which induces a party to enter into a contract overrides any inconsistent written agreement. The device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

H

[28] The above case is applicable in our case. I also refer to the judgment of His Royal Highness Raja Azlan Shah CJ (as His Highness then was) and I quote:

I

In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts. The classic statement on collateral contract was made by Lord Moulton in Heilbut Symons & Co v Buckleton [1913] AC 30 at p 47. 'It is evident, both on principle and

- A on authority, that there may be a contract the consideration for which is the making of some other contract. 'If you will make such and such a contract I will give you one hundred pounds', is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract.' The case of *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129 and the subsequent applications of it has, in our opinion, fortified this not unfamiliar doctrine. We think Lord Denning MR summarised it in *Dick Bentley Productions, Ltd v Harold Smith (Motors), Ltd* [1965] 2 All ER 65 at p 67: 'Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.'
- B
- C
- D In *Mudd's* case, a tenant signed a lease containing a covenant to use the premises for business purposes only. He had in fact resided there for some time and was only induced to sign the lease by an oral assurance that the lessors would not object to his continuing to do so. In an action by the lessors to forfeit the lease for breach of the covenant it was held that the tenant could rely on the oral assurance as 'a clear contract acted upon by the defendant to his detriment from which the plaintiffs cannot be allowed to resile.' Yet the oral, agreement clearly contradicted the lease. Three recent decisions are worth mentioning, ie, *Mendelssohn v Normand Ltd* [1970] 1 QB 177; *J Evans & Son v Andrea Merzario* [1976] 2 All ER 930; *Brikom Investments Ltd v Carr* [1979] 2 All ER 753.
- E
- F In *Mendelssohn v Normand Ltd*, the car owner left his car unlocked at a car park after he had been assured by the attendant that the car would be locked. His suitcase was later stolen from his unlocked car. The parking ticket by its terms protected the defendant. It was also specifically argued that the terms could not be varied by the oral assurance of the attendant. In spite of all that the Court of Appeal held that the assurance given by the attendant that the car would be kept locked overrode the written terms. 'The reason is because the oral promise or representation has a decisive influence on the transaction — it is the very thing which induces the other to contract — and it would be most unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation' (Per Lord Denning at p 184). Phillimore LJ said at p 186: 'Whether you regard that promise as a representation or whether you regard it as a collateral term of the contract, or whether you regard the contract as being partly oral and partly in writing in the shape of the ticket it seems to me it can make no real difference.'
- G
- H
- I In *J Evans & Son v Andrea Merzario*, the defendant forwarding agents assured the plaintiff importers that containers in which the latter's goods were stored would be carried under deck. Prices were renegotiated but nothing was put in writing in relation to the containers being carried below deck. The goods were carried 'on the usual terms and conditions appearing on the form.' When a machine was lost due to the fact that a container was not stored below deck, the plaintiffs succeeded in the

Court of Appeal in enforcing the oral assurance. Lord Denning MR considered that the assurance given by the defendant that the containers would be stored below deck was given in order to persuade the plaintiff to accept the use of containers. Because it so induced the plaintiffs, it ought to be binding. 'When a person gives a promise, or an assurance to another, intending that he should act on it by entering into a contract, and he does act on it by entering into the contract, we hold that it is binding': see *Dick Bentley Production Ltd v Harold Smith (Motors) Ltd*.

In *Brikom Investments v Carr*, a tenant, relying on the representation made to her by the landlords, that they would repair the roofs at their own expense refused to contribute to the costs of repairs. It was held, inter alia, that there was a perfectly good collateral contract between the landlords and her since she had given consideration for the landlords' promise regarding the repairs by entering into the lease in reliance on that promise. 'When two parties are about to enter into an agreement for a lease, a lease which imposes on the lessee a very burdensome obligation in respect to repairs, I can see no reason why one party cannot say to the other: 'In relation to those outstanding matters, whatever may be our legal position under the terms of the lease, we will not as landlords enforce that obligation against you.' I see no reason why effect should not be given to such a position. I think the evidence shows that that was the position here; there was a perfectly good collateral contract between these two parties.' (per Roskill LJ at p 763).

In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

[29] This decision was referred to with approval by the Privy Council in the case of *State of Brunei Darussalam v Prince Jefri Bolkiah* [2007] UKPC 63, we refer particularly to the judgment of Lord Mance at paras 47–48 and I quote:

47. First, I wish to leave open the validity of the alternative 'technical legal reason' suggested in paragraph 15 of Lord Scott's opinion. For the respondents, Mr Pascoe QC rightly conceded in the Court of Appeal that 'the trouble with the parol evidence rule and the statutory enactments, is one is liable to go round in a circle with the parol evidence rule. If the Court finds that all the terms of a written document — all the terms of an agreement have not been reduced to the written document, of course the Court is going to let evidence in of other terms'. The many well-known clauses to prevail over inconsistent oral agreements collaterally agreed (cf eg *City and Westminster Properties [1934] Ltd v Mudd* [1959] Ch 129; *Mendelssohn v Normand Ltd* [1970] 1 QB 177; *Brikom Investments Ltd v Carr* [1979] 2 All ER 753, etc). These provide a induced by a collateral agreement or misrepresentation, I find it hard to believe that ss 91 and 92 would have prevented this being proved and relied upon.

48. There is moreover express authority at the highest level in the neighbouring common law jurisdiction of Malaysia confirming this view. In at least two cases (relied upon by the appellants in their supplemental case, paragraph 6), the

- A** Malaysian Federal Court of Civil Appeal applied the common law authorities to which I have referred and took the same view as I would under the identically worded provisions of ss 91 and 92 of the Evidence Act. They are *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 (where judgment was given by no less than Raja Azlan Shah CJ) and *Tan Chong & Sons Motor Company (Sdn) Berhad v McKnight* [1983] 1 MLJ 220. Written agreements were in these cases executed on the faith of an inconsistent collateral oral promise and representation, respectively, and ss 91 and 92 were held to be no bar to such promise and representation being proved and relied upon. I would not wish to disagree with these authorities.
- B**
- C** [30] Having evaluated the evidence that was before us as we are entitled to do it is quite clear that the respondent had invited the appellants to enter into a proposed restructuring exercise, wherein the pledge of shares of PCB, to the first defendant would be redeemed by the first defendant and in return PCB would be restructured, removed from PN 17 status and by virtue of the reverse takeover the first defendant would be in control in PCB.
- D**
- E** [31] It is inconceivable in our view that the appellants would have agreed to enter into such an arrangement if not for the restructuring exercise, bearing in mind the first defendant was never the original borrower of the said loan. It is also erstwhile to note that the respondent had caused itself to be appointed as an advisor for the proposed restructuring exercise and was to earn a fee of RM600,000 (see Yeong Sook Fun's ('PW1') evidence under cross-examination at lines 293–404 of pp 371–372 of *Jld 2(1) Bahagian B of rekod rayuan*)
- F** [32] The restructuring exercise would require Securities Commission's ('the SC') approval and that of other regulatory authorities and while this was pending, interest only was to be serviced and it is not a disputed fact the interest was serviced:
- G** ML: Would you agree that the first defendant paid the monthly interest until February 2008?
- Yeong: Until when? I cannot recall exactly but they did pay.
- H** [33] We also find that the repayment agreement, the novation agreement and the guarantee are linked to the success of the corporate restructuring and it is a condition precedent to liability under these three agreements (see evidence of Yeong Sook Fun at p 358 *rekod rayuan 2(1) Bahagian B* at lines 225–233):
- I** Yeong: Dunia Dimensi's main purpose of taking up the loan is for the margin financing of PCB shares. And when Good Quantum took over the loan, when the loan was novated to Good Quantum from Dunia Dimensi, automatically also the shares were taken over.
- ML: This is just a pure and simple straightforward transaction of buying the PCB shares.

Yeong: No. It's a novation of the loan itself.

A

[34] The respondent through its nominees proceeded under this restricting exercise to apply for the SC's approval (at pp 1004–1042 *rekod rayuan Jld 2(5) Bahagian C*). On 28 May 2007, the SC finally rejected the restructuring exercise.

B

[35] Based on all aforesaid evidence, we find there is credible and sufficient evidence of inducement, persuasion and assurance given by the plaintiff which constituted the collateral contract prior to the execution of the repayment agreement, novation agreement and guarantee. The learned High Court judge based her judgment on the four corners of the existing agreements. The learned trial judge in our view failed to appreciate the evidence that was before the court in respect of the collateral contract. The important question that the learned judge should have asked herself is whether if the arrangement under restructuring exercise were not in place, would the first defendant have signed the novation agreement, the repayment agreement and the guarantees. In our view the evidence points to the fact that they signed these agreements which in effect means a taking over of Dunia Dimensi liability with the plaintiff because of the assurances given by the plaintiff to the defendants under the restructuring exercise. It would be incredulous for the defendants to agree take over these liabilities if not for assurances under the restructuring exercise. In fact PW1 made it clear in her evidence that the repayment agreement is related and dependant on the successful restructuring of PCB. Since that restructuring has been rejected by the SC, the appellants could not have been liable by the learned judge.

C

D

E

F

[36] The learned judge also failed to take into account that the evidence pointed to the plaintiff being fully aware of this collateral arrangement and participating in them as advisor of the restructuring exercised was to earn an hefty fee.

G

[37] For the aforesaid reasons we find there is merit in this appeal and the court on the upshot orders:

H

- (a) the appeal is allowed with costs;
- (b) the order of the learned judge in the high court is set aside;
- (c) the counterclaim of the defendants is allowed; and
- (d) the respondent to pay the appellants costs in the sum of RM15,000 here and the court below.

I

A *Appeal allowed with costs of RM15,000.*

Reported by Afiq Mohamad Noor

B

C

D

E

F

G

H

I